Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1627

In The
Supreme Court of the United States
October Term, 1985

FRED MAYER,

Petitioner,

vs.

EDWARD DAVIS, CLERK OF AKRON CITY COUNCIL
and PATRICIA C. AMBROSE,
Agent for Annexation Petitioners,

Respondents.

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

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QUESTION PRESENTED FOR REVIEW

DO THE DUAL REQUIREMENTS OF OHIO REVISED CODE SECTION 709.07(A) THAT A PROPERTY OWNER PROVE BOTH THAT:

(1) HIS LEGAL RIGHTS OR INTERESTS WOULD BE AFFECTED BY ANNEXATION.

AND

(2) THERE IS ERROR IN THE PROCEEDINGS BEFORE THE BOARD OF COMMISSIONERS.

IN ORDER TO SECURE AN INJUNCTION AGAINST ANNEXATION VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

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OBJECTION TO JURISDICTION OF THIS COURT

Petitioner seeks review of the December 4, 1985 denial of certification by the Ohio Supreme Court. This Ohio Supreme Court judgment entry (Petition for Certification, Appendix A3) in boiler plate fashion states in part:

> . . . It is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

Petitioner invokes the jurisdiction of this court through 28 U.S.C. section 1257(3) claiming this language necessarily means the Ohio Supreme Court considered a constitutional question.

Fred Mayer asserts that the application of Ohio Revised Code section 709.07, which allowed his property to be annexed against his wishes, operates as a taking of his property without due process under the 5th and 14th Amendments to the U.S. Constitution. No federal constitutional question has been raised or considered by any other court until Petitioner applied to this court for a writ of certiorari.

Petitioner mistakenly relies on the judgment entry of the Ohio Supreme Court as the basis for this Court's jurisdiction. Neither the Ohio Ninth District Court of Appeals nor the Ohio Supreme Court considered a federal constitutional question.

The only issue before the first appellate court was whether the local County Council could decide an annexation petition beyond ninety days after the public hear-

ing under the language of Ohio Revised Code section 709.033(D).

The first mention of any constitutional basis for appeal is in Petitioner's Notice of Appeal to the Ohio Supreme Court. (Appendix App. 5) Petitioner attempted an appeal as of right under the Ohio Constitution, article IV, section 2B(2)(a)(iii) and under the guise of a case of great public or general interest. Article IV, section 2(B)(2)(d). However, Petitioner never argued or presented any constitutional grounds for an appeal to the Ohio Supreme Court. The two propositions of law presented to the Ohio Supreme Court by Petitioner were:

Proposition of Law Number One:

THE FAILURE OF A BOARD OF COUNTY COMMISSIONERS OR COUNTY COUNCIL TO MAKE ALL FINDINGS REQUIRED BY OHIO REVISED CODE SECTION 709.033(D) AS AMENDED EFFECTIVE SEPTEMBER 26, 1984, IN A DECISION RENDERED DECEMBER 17, 1984 IS SUFFICIENT ERROR FOR PURPOSE OF OHIO REVISED CODE SECTION 709.07(D)(1) TO PERMIT A TRIAL COURT TO ISSUE A PERMANENT 709.07 INJUNCTION AGAINST THE ANNEXATION.

Proposition of Law Number Two:

IT IS ERROR FOR PURPOSES OF OHIO REVISED CODE SECTION FOR A COUNTY COUNCIL OR A CHARTER COUNTY TO FAIL TO ACT ON A PETITION FOR ANNEXATION WITHIN THE NINETY (90) DAY PERIOD PRESCRIBED BY THE CHARTER COUNTY'S OWN ANNEXATION PROCEDURES.

Petitioners entire memorandum in support of jurisdiction filed with the Ohio Supreme Court is devoid of any

state or federal constitutional argument. At no appellate level prior to the notice of appeal to this court has Petitioner presented a constitutional ground for appeal.

By the very language in *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185-86 (1945), that Petitioner excerpts in his petition for writ of certiorari, there is no federal constitutional issue that has ever been considered and decided by any of the appellate courts. Petitioner did not even impliedly raise the issue in state court that Chapter 709 of the Ohio Revised Code was unconstitutional.

The language in the judgment entry of the Ohio Supreme Court is a result of Petitioner seeking appellate review by the Ohio Supreme Court on two grounds under Article 2(B) of the Ohio Constitution:

(1) a case involving questions arising under the constitution of the United States or of this state; and
(2) a case of public or great general interest.

Since Petitioner never addressed any constitutional basis to the Ohio Supreme Court for his alleged appeal of right, the Supreme Court clearly dismissed the appeal in accordance with Rule II, section 3(B) of the Supreme Court Rules of Practice.

> (B) Where appellant claims that he has an appeal as of right (i.e., that the case involves a constitutional question), the Supreme Court will sua sponte, consider the case as a motion to dismiss the appeal as one not involving any substantial constitutional question and will consider such motion to dismiss at the same time that it considers any motion to certify or motion for leave to appeal in the case.

To follow Petitioner's logic on jurisdiction, every case dismissed under section 3(B) of Rule II of the Ohio Supreme Court Rules of Practice would mean the Ohio Supreme Court considered and decided a constitutional issue. It is clear that this Ohio Supreme Court Rule of Practice never meant to have that automatic jurisdictional effect on attempted appeals in the United States Supreme Court.

—o—

STATEMENT OF THE CASE

Fred Mayer and David Meeker owned 1.033 acres in an unincorporated territory called Northampton Township. On February 9, 1984, both Meeker and Mayer signed a petition to the Summit County Council seeking the annexation of their property to the City of Akron pursuant to Ohio Revised Code sections 709.02 and 709.03. A public hearing was held on June 4, 1984 in accordance with Ohio Revised Code section 709.032. In addition to signing the petition for annexation, both owners, Fred Mayer and David Meeker, presented affidavits to the County. Mayer's affidavit signed June 1, 1984 stated:

(1) It was in the best interests of the property and for the general good of the territory to be annexed to the City of Akron.

(2) The City of Akron could provide better services to the property.

On December 17, 1984, Summit County Council passed a resolution approving the annexation Resolution No. 84-726. (Petition for Writ of Certiorari, Appendix A35). The annexation materials were transmitted to Ed Davis, Clerk of Akron City Council for presentation to the City

of Akron pursuant to Ohio Revised Code sections 709.033 and 709.04.

On January 11, 1985 Mayer and Meeker dissolved their partnership. On January 31, 1985, Mayer filed an action under Ohio Revised Code section 709.07 seeking to enjoin the annexation of the property.

Mayer, in accordance with the requirements of Ohio Revised Code section 709.07(A) challenged the annexation. Under subsection A, Mayer, as an "interested person" has a twofold burden to sustain injunctive relief, i.e.:

(1) Mayer must prove by clear and convincing evidence that his legal interests or rights would be adversely affected by the annexation; and

(2) Mayer must prove that the board of County Commissioners (County Council) committed error under Ohio Revised Code section 707.04, 709.032 or 709.033.

The error claimed by Mayer under Ohio Revised Code section 709.07(A)(2) was that the Summit County Council granted the annexation petition beyond the ninety day time frame outlined in Ohio Revised Code section 709.033. The language of Ohio Revised Code section 709.033 was adopted by Summit County Council by Resolution.

The trial court found that Mayer met his burden of proof on both prongs of 709.07(A). However, the Ninth District Court of Appeals disagreed. The Ninth District Court found that Mayer only demonstrated that his legal rights or interests would be adversely affected but proved no other error under 709.07(A)(2). Mayer's claimed error that the County Council's approval of the annexation

beyond the ninety day limit was without merit. Since Mayer claimed no other error, he was not entitled to injunctive relief.

The Ninth District Court of Appeals reversed the trial court and directed the lower court to enter an order granting the annexation of Mayer's property. Mayer moved the Ohio Supreme Court for a motion to certify the record for review. This motion was dismissed.

As stated previously, the record does not demonstrate that Mayer ever presented and argued the federal constitutionality of Ohio's annexation laws.

—o—

ARGUMENT SUMMARY

Petitioner, Mayer, has not suffered any loss of a federal constitutional right or privilege. In fact, Mayer has been afforded due process since the day he signed an annexation petition. Mayer availed himself of Ohio annexation laws that provide avenues to annex property as well as prohibit the annexation of property. Because Mayer did not prevail in his attempt to stop this annexation after initially attempting annexation, he argues his rights to due process have been violated and the Ohio annexation laws are unconstitutional.

Ohio Revised Code section 709.02 only requires that a majority of landowners in a territory sought to be annexed need sign a petition for annexation. It is clear through the language of both Revised Code sections 709.02 and 709.033 that property can be annexed against a property owner's desires. However, section 709.07 affords

any dissident owner in the area to be annexed the opportunity to redress whatever wrong he claims from the annexation process.

Here Mayer as an "interested person" filed a 709.07 injunction action. However, Mayer did not prove an essential element to stop this annexation. Mayer did not show error in the proceedings before the County Council as required by section 709.07(A)(2). This lack of evidence production does not amount to violations of federal due process rights guaranteed by the Fifth and Fourteenth Amendments.

Petitioner's alleged error at all appellate levels under section 709.07(A)(2) was that the decision-making body on annexations (County Council) erred when it approved the annexation beyond the 90 day limit in Ohio Revised Code section 709.033. This was the only issue before the Ninth District Court of Appeals. Mayer simply did not sustain his burden of proof at the trial court level to support a 709.07 injunction. Mayer only demonstrated one element of the two-pronged requirements under 709.07(A)(1) and (2).

This annexation history does not amount to a constitutional deprivation but rather a self-imposed failure to meet a burden of proof.

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ARGUMENT

THERE IS NO FEDERAL CONSTITUTIONAL PRINCIPLE IN THE FIFTH AND FOURTEENTH AMENDMENTS THAT IS VIOLATED BY THE APPLICATION OF OHIO REVISED CODE SECTION 709.07(A) IN ANNEXATION PROCEEDINGS.

The Ninth District Court of Appeals decision clearly stated that Mayer was not entitled to an injunction because he failed to prove an essential prerequisite.

Ohio Revised Code section 709.07(A) reads:

> (A) Within sixty days from the filing of the papers relating to the annexation with the auditor or clerk as provided by division (D) of section 707.04 or by section 709.033 [709.03.3] of the Revised Code, any person interested, and any other person who appeared in person or by an attorney in the hearing provided for in section 709.031 [709.03.1] of the Revised Code, may make application by petition to the court of common pleas praying for an injunction restraining the auditor or clerk from presenting the annexation petition and other papers to the legislative authority. The petition or a person interested shall set forth facts showing:
>
> (1) How the proposed annexation adversely affects the legal rights or interests of the petioner;
>
> (2) The nature of the error in the proceedings before the board of county commissioners pursuant to section 707.04, 709.032 [709.03.2], or 709.033 [709.03.3] of the Revised Code, or how the findings or order of the board is unreasonable or unlawful.

The petition of any other person shall set forth facts application to division (A)(2) of this section.

Based on these standards the Ninth District Court of Appeals reviewed Mayers claimed error before the County Council, i.e., that the decision on the annexation petition was rendered beyond the ninety day limit mentioned in section 709.033. The Court in its decision succinctly states the basis for its reversal of the trial court and the annexation order:

> R.C. 709.07 requires one petitioning for injunctive relief to make a two-fold showing. First, the petitioner must demonstrate by clear and convincing evidence that his legal interests or rights would be adversely affected by the annexation. Mayer has satisfied this first requirement by his showing that the annexation would cause him to pay higher taxes, would make his property more difficult to lease, and would cause him to lose those tenants presently leasing his property.
>
> Secondly, R.C. 709.07 requires the petitioner to demonstrate error in the annexation proceedings. As indicated above county council committed no error in delaying the annexation decision beyond the ninety day time period. Since Mayer has shown no other error in the annexation proceedings before county council, he has failed to satisfy this second requirement. Mayer is consequently not entitled to the injunctive relief afforded under R.C. 709.07.

Petitioner has disguised his failure to sustain his burden of proof as a monumental constitutional deprivation of his property.

The landmark Supreme Court decision in the annexation field is *Hunter v. Pittsburgh*, 207 U.S. 161 (1907). *Hunter* has not stood for the proposition that states have unfettered discretion to establish or reorganize its political subdivisions. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Rather, *Hunter* characterizes state annexation processes as political matters entrusted to state legislatures.

In *Hunter*, residents of Allegheny, the territory being annexed to Pittsburgh, challenged the constitutionality of a Pennsylvania annexation statute. Under the statute, if a majority of the votes cast in Pittsburgh and Allegheny favored annexation, then annexation could proceed. Although the majority of the residents of Allegheny opposed their annexation, the annexation proceeded. Just as the instant Petitioner Mayer claims, the Allegheny residents challenged Pennsylvania's annexation laws as repugnant to the Fifth and Fourteenth Amendments.

The Supreme Court in *Hunter* discussed the Fifth Amendment's application to annexation laws.

> We have nothing to do with the policy, wisdom, justice, or fairness of the act under consideration; those questions are for the consideration of those to whom the state had entrusted its legislative power, and their determination of them is not subject to review or criticism by this court. We have nothing to do with the interpretation of the Constitution of the state and the conformity of the enactment of the assembly to that Constitution; those questions are for the consideration of the courts of the state, and their decision of them is final. 207 U.S. at 176.

The Court's discussion concerning the Fourteenth Amendment indicates a clear deference to the state in matters of annexation.

The Sixth Circuit Court of Appeals has consistently upheld state annexation procedures against constitutional challenges by relying on *Hunter*. *Detroit Edison Co. v. East China Township School District No. 3*, 378 F.2d 225 (6th Cir. 1967), cert. den. 389 U.S. 932 (1967); *Deane Hill Country Club Inc. v. City of Knoxville*, 379 F.2d 321 (6th Cir. 1967) cert. den. 389 U.S. 975 (1967); *Carlyn v. Akron*, 726 F.2d 287 (6th Cir. 1984).

The Court of Appeals in *Detroit Edison* cites at page 229 decisions from the Fifth and Tenth Circuits to support its conclusion. In *Hammonds v. City of Corpus Christi*, 343 F.2d 162 (5th Cir. 1965), cert. denied, 382 U.S. 837 (1965), the court found no error in the District Court's decision which dismissed the complaint on the ground, among others, that "the annexation of lands to a city has been held without exception to be purely a political matter, entirely within the power of the State Legislature to regulate." And in *International Harvester Co. v. Kansas City*, 308 F.2d 35 (10th Cir. 1962), cert. denied, 371 U.S. 948 (1963), after quoting from *Hunter* the court stated:

> Neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercise of a state's political functions. * * * *Id.* at 39.

Following *Detroit Edison* is another Sixth Circuit decision pertaining to annexation, *Deane Hill Country Club Inc. v. City of Knoxville*, 379 F.2d 321 (6th Cir. 1967), cert. denied 389 U.S. 975 (1967). Here the plaintiffs also asserted Fifth and Fourteenth Amendment challenges. The court indicated:

> It is clear, for the reasons set forth in the *Detroit Edison Co. v. East China Township School District, supra*, that *Hunter* precludes constitutional challenge under the Fourteenth Amendment to annexations by municipal corporations of adjoining territories on the basis of the procedure employed or authorized by the state or because of the pecuniary repercussions in the form of the ordinary incidence of city taxation. It follows that the District Court properly dismissed the complaint herein. *Id.* at 325.

The only exception in annexation cases subjecting state statutes to review under due process or equal protection are boundary changes for the purpose of racial discrimination which is not at issue here.

The Supreme Court has reemphasized the significance of *Hunter* in addressing powers reserved to the states in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 58 (1978).

> In *Hunter v. Pittsburgh*, the court discussed at length the relationship between a State and its political subdivision, remarking: "The number, nature and duration of the power conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the state." Ibid. While the broad statements as to state control over municipal corporations contained in *Hunter* have undoubtedly been qualified by the holdings of later cases such as *Kramer v. Union Free School Dist.*, *supra*, we think that the case continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them. *Id.* at 71.

Carlyn v. City of Akron, 726 F.2d 287 (6th Cir. 1984), presented the exact issue Petitioner Mayer has asserted—Are Ohio's annexation statutes federally constitutional? The Sixth Circuit upheld the constitutionality of Ohio's annexation laws. As the court noted in *Carlyn*, annexation is state social policy not a constitutional infraction.

Petitioner Mayer misinterprets the breadth of *Garcia v. San Antonio Metro Transit Auth.*, — U.S. —, 105 S.Ct. 1005 (1985), as a cry for this court to redefine states rights beyond the commerce clause. More importantly *Garcia's* reach does not touch state annexation processes.

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CONCLUSION

Respondents respectfully request this Court deny the Petition for a writ of certiorari. Petitioner failed to properly invoke the jurisdiction of this Court by timely raising the federal constitutionality of Ohio's annexation statutes. In addition, Petitioner has consistently been afforded due process since the inception of this annexation process.

Respondents request that the decision of the Ninth District Court of Appeals, Summit County, Ohio, be permitted to stand and that this annexation proceed according to the Court's order.

Respectfully submitted,

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PATRICIA C. AMBROSE, Agent
for the Petitioners for
Annexation

APPENDIX

§ 2 The supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of the ? igest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor. (Amended May 7, 1968).

RULE I

NOTICE OF APPEAL

SECTION 1. From Court of Appeals.

(A) The notice of appeal from a Court of Appeals must be filed in the court from which the case is appealed within thirty days from the entry of the judgment or final order appealed from and shall state:

(a) The name of the court and date of the order or judgment appealed from, and

(b) If applicable, that the case originated in the Court of Appeals, and

(c) If applicable, that the case involves a substantial constitutional question.

(d) If a timely notice of appeal is filed in the Court of Appeals by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed.

(B) A copy of that notice of appeal must be filed or offered for filing in the Supreme Court not later than thirty days after the filing of such notice in the Court of Appeals. The copy of the notice of appeal shall show the date of filing in the Court of Appeals.

RULE II

DETERMINATION OF JURISDICTION ON APPEALS FROM COURTS OF APPEALS

SECTION 3. Consideration as to Existence of Constitutional Question.

(A) If an appellant contends that a case involves a substantial constitutional question and also contends that such case is of public or great general interest, it is necessary to file only one notice of appeal. (See Rule I [A][a] and [c]).

(B) Where appellant claims that he has an appeal as of right (i.e., that the case involves a constitutional question), the Supreme Court will *sua sponte*, consider the case as on a motion to dismiss the appeal as one not involving any substantial constitutional question and will consider such motion to dismiss at the same time that it considers any motion to certify or motion for leave to appeal in the case.

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
SUMMIT COUNTY, OHIO

CASE NO. C.A. 12090

COMMON PLEAS CASE NO. 85-1-0312

FRED MAYER,

Plaintiff-Appellee

vs.

EDWARD DAVIS, ET AL.

Defendants-Appellants

NOTICE OF APPEAL
(Filed in the Court of Appeals on Sept. 11, 1985)

The Appellee Fred Mayer hereby gives notice of his appeal to the Supreme Court of Ohio from the judgment of the Ninth District Court of Appeals for Summit County, dated 28 August 1985. This case did not originate in the Court of Appeals. This case does involve a substantial constitutional question and does present a question of public or great general interest.

Respectfully submitted,

/s/ Alfred E. Schrader
ALFRED E. SCHRADER
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411 Wolf Ledges Parkway, Suite 401
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was sent by Ordinary U.S. Mail to Patricia Ambrose, Assistant Akron Law Director, 202 Ocasek Government Office Building, 161 S. High St., Akron, Ohio 44308, this 11 day of September 1985.

/s/ Alfred E. Schrader
ALFRED E. SCHRADER
Attorney for Appellee, Fred Mayer

IN THE SUPREME COURT OF OHIO

CASE NO. 85-1582

FRED MAYER

Appellant

vs.

EDWARD DAVIS, CLERK
OF THE CITY OF AKRON, et al.

Appellees

NOTICE OF APPEAL

SUMMIT COUNTY COMMON PLEAS
CASE NO. 85-1-0312

NINTH OHIO APPELLATE DISTRICT
CASE NO. 12090

The Appellant, FRED MAYER, of Summit County, Ohio, gives notice of his appeal to the United States Supreme Court from the judgment of this Court dated December 4, 1985, wherein this Court dismissed Appellant's appeal on the ground that no substantial constitutional question exists herein (Justice Brown dissenting).

This Appeal is brought and the United States Supreme Court has jurisdiction, pursuant to 28 U.S.C. 1257(2).

This Appeal involves the Federal constitutional right to due process under the United States Constitution, 14th Amendment and involves the procedural due process element that specific findings by County Commissioners are necessary, prior to the passage of a resolution permitting annexation.

This Appeal also involved Federal constitutional property rights as well as issues of federalism, as to whether or not a state may ignore Federal constitutional rights of individuals, in matters of political subdivision boundary changes.

/s/ Alfred E. Schrader
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AFFIDAVIT OF SERVICE

I, ALFRED E. SCHRADER, being first duly sworn according to law, do hereby depose and say that all parties required to the Supreme Court Rules to be served have been served pursuant to Rule 28.5 (c) and 28.4 (c). A copy of the foregoing Notice of Appeal to the United States Supreme Court was filed with the Ohio Supreme Court and the Ninth Ohio District Court of Appeals and sent by regular U.S. Mail, First Class, postage prepaid, to Attorney Patricia Ambrose, Assistant Law Director, City of Akron, 161 S. High Street, Akron, Ohio 44308; and upon Anthony Celebrezze, Ohio Attorney General, 30 E. Broad Street, Columbus, Ohio 43215, this 11th day of December, 1985.

/s/ Alfred E. Schrader
ALFRED E. SCHRADER
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Akron, Ohio 44311
(216) 762-6478

SWORN TO before me and subscribed in my presence this 11 day of December 1985.

/s/ Eugene L. (illegible)
Notary Public
Attorney at Law
No Expiration